

Binode Behari Nath Vs. Emperor

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Court : Kolkata

Decided On : Jun-28-1923

Reported in : AIR1924Cal392

Judge : C.C. Ghose and ;Cuming, JJ.

Appellant : Binode Behari Nath

Respondent : Emperor

Judgement :

Ghose, J.

1. The facts of this case have been set out in the judgment which my learned brother is about to deliver, and it is, therefore, unnecessary for me to refer to the same again. I have gone through the entire record, and I am satisfied that there are no merits whatsoever in the petitioner's case.

2. A point has been taken that, inasmuch as the petitioner was not examined under the provisions of Section 342 of the Criminal Procedure Code, such an omission has vitiated the entire proceedings. I am not prepared to extend the principle of the case of Mazahar Ali v. Emperor 71 Ind. Cas. 662 : 50 C. 223 : 36 C.L.J. 417 : 27 C.W.N. 99 : 24 Cr. L.J. 198; (1923) A.I.R. (C.) 196 to inquiries under the provisions of Section 110. As far as I can see from the record, the petitioner has not been prejudiced in any way by the omission to examine him

under the provisions of Section 342, and I agree that to send the case back in order that the Magistrate might formally question him under the provisions of Section 342 would be a farce. I, therefore, think that the present Rule should be discharged.

3. Cuming, J.--The petitioner in this case, one Binode Behari Nath, has been ordered to furnish security for his good behaviour, under Section 110 read with Section 118 of the Criminal Procedure Code, by giving a bond himself for Rs. 300, with two sureties for Rs. 300 each, for two years by the Deputy Magistrate at Alipore. As he failed to furnish the necessary securities, he has been ordered to suffer rigorous imprisonment for two years by the Sessions Judge at Alipore acting under Section 123 of the Criminal Procedure Code.

4. The Rule has been granted on the ground that the petitioner was not examined, under Section 342 of the Criminal Procedure Code, at the close of the case for the prosecution and before he was called on for his defence. The petitioner contends that he is an accused person, that under the provisions of Section 117 of the Criminal Procedure Code, the trial should be conducted as a warrant case, and that, therefore, he should have been examined under Section 342 at the close of the case for the prosecution and before he was called on for his defence. He contends, relying on the case of *Mazahar Ali v. Emperor* 71 Ind. Cas. 662 : 50 C. 223 : 36 C.L.J. 417 : 27 C.W.N. 99 : 24 Cr. L.J. 198; (1923) A.I.R. (C.) 196, that this provision is mandatory, and so the trial is bad in law. He does not contend that he has been in anyway prejudiced by the omission. He frankly admits he has not, and on the facts it is clear he has not. He was defended by Pleaders and put in a written statement. He contends, however, that in view of the case of *Mazahar Ali v. Emperor* 71 Ind. Cas. 662 : 50 C. 223 : 36 C.L.J. 417 : 27 C.W.N. 99 : 24 Cr. L.J. 198; (1923) A.I.R. (C.) 196, the Court should go through the form of examining him before he is called on for his defence. Now the proceeding in which he was called on to give security was not a trial. There is a distinction between a trial and an inquiry.

5. 'Inquiry' includes every inquiry other than a trial conducted by a Magistrate or Court under the Criminal Procedure Code, see Section 4 (k). Now the Code

describes these proceedings under Chapter VIII as 'inquiries'. All through the Chapter the expression used is 'inquiry': see especially Section 117 (2).

6. When the Code refers to trial it uses the word 'trial' (see Chapters XX, XXI, XXII and XXIII, with special reference to Section 241, Section 251, Section 260, Section 262 and Section 267). It is clear, I think, therefore, that these proceedings under Chapter VIII are 'inquiries' and not 'trials.'

7. The petitioner has contended that the person called on to give securities under Chapter VIII is an accused person. The expression 'accused' is nowhere defined: in the Code. It is to be noted that not where in Chapter VIII is the person, called on to give securities either under Section 106, Section 107, Section 109 and Section 110, referred to as an accused person.

8. In the Chapters XVIII, XIX, XX, XXI, XXII and XXIII, which deal with trials and inquiries preliminary to commitment for trial the expression 'accused' is always used to denote the person proceeded against. Prima facie then a person proceeded against under Chapter VIII would not appear to be an 'accused' person as the expression is used in the Criminal Procedure Code.

9. The petitioner would rely on the case Of Jhoja Singh v. Queen-Empress 23 C. 493 : 12 Ind. Dec. (N.S.) 328, which followed Queen-Empress v. Mona Puna 16 B. 661 : 8 Ind. Dec. (N.S.) 910. In that case the learned Judges held that 'accused' meant a person over whom the Magistrate or Court was exercising jurisdiction. With great respect to the learned Judges, it would seem that such an interpretation would lead to somewhat startling results. For instance, a witness who is compelled by a summons or a warrant to appear before a Court and then give evidence is clearly a person over whom the Court is exercising jurisdiction, and so a witness would be an 'accused' person, and no oath could be administered to him. Be that as it may, the learned Judges were there considering the question as to whether such a person should be considered as an accused person for the purpose of Section 340, and, strictly speaking, they decided nothing more. The ruling cannot be held to lay down that for the purposes of Section 343 a person called on to give security is an accused person. Looking also at the wording of Section 342 itself, it would seem very doubtful if the expression 'accused' covers the case of a person

called on to give security. Sub-section (3) states that the answer he gives may be put in evidence against him in any other inquiry into or trial for any other offence, and so presupposes that an accused person is a person accused of an offence. Offence is defined in Section 4 (o) as an act or omission punishable by any law. A person called on to give security cannot be said to be a person accused of an act or omission punishable by law.

10. Speaking for myself, I have grave doubts whether a person proceeded against under Chapter VIII is an accused person.

11. The petitioner has, however, relied on Section 117 (2), which provides that, where the order requires security for good behaviour, the inquiry shall, as nearly as may be practicable, be conducted in the manner prescribed for conducting trials and recording evidence in warrant cases, except that no charge shall be framed. It has been held in the case of *Mazahar Ali v. Emperor* 23 C. 493 : 12 Ind. Dec. (N.S.) 328 that in a trial the omission to examine the accused before he is called on for his defence is an illegality, the provisions of the Section 342 being mandatory. Without expressing any opinion as to the correctness or otherwise of this ruling, I am not prepared to extend its principle to inquiries under Section 110. The object of the examination of the accused is to give him an opportunity of explaining any circumstances which may appear against him in evidence. In the present case, the petitioner was defended by Pleaders, and he put in a written statement. He himself admits that he has not been prejudiced in any way by the omission to formally examine him. In such circumstances to send back the case in order that the Magistrate might formally question him would be an elaborate farce. He would say, and here I speak from experience, that he has nothing to add to his written statement, and any attempt to question him would be stigmatized as cross-examination. In my opinion, the omission to examine formally the person called on to furnish security is an irregularity curable under Section 537. In the present case, the petitioner admits that he has been in no wise prejudiced by the omission, and so clearly it cannot be said that the omission has caused a failure of justice. I would discharge the Rule.